

FCC MAIL SECTION
Federal Communications Commission
Washington, D.C. 20554

JUL 9 11 53 AM '93

MM Docket No. 92-3 ✓

DISPATCHED BY

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Prineville and Sisters, Oregon)

RM-7874
RM-7958

ORDER DENYING MOTION TO STRIKE

Adopted: June 24, 1993;

Released: July 8, 1993

By the Chief, Policy and Rules Division:

1. At the request of Schuyler H. Martin ("Martin"), licensee of Station KPXA, Sisters, Oregon, the Commission has before it a motion to strike filed in response to the *Report and Order* in this proceeding, 7 FCC Rcd 6516 (1992). An opposition to the motion to strike was jointly filed by Central Oregon Broadcasting, Inc., Redmond Broadcast Group, Inc., Highlakes Broadcasting Company, JJP Broadcasting, Inc., Oak Broadcasting, Inc., Sequoia Communications, and The Confederated Tribes of the Warm Springs Reservation of Oregon ("the Commenters").¹ Martin filed a reply.

2. *Background.* The *Report and Order* in this proceeding substituted Channel 281C1 for Channel 281A at Sisters and modified the construction permit for Station KPXA to specify the higher class channel, as requested by Martin. A mutually exclusive proposal seeking the allotment of Channel 284A to Prineville, Oregon, was withdrawn by its proponent, Danjon, Inc. The Commenters, who had filed a timely opposition to the proposals, subsequently filed a petition for reconsideration of the *Report and Order*.²

3. *Motion to Strike.* Martin's motion to strike was filed in response to the Commenters' petition for reconsideration. He notes that under Section 1.429(d) of the Commission's Rules, a petition for reconsideration must be filed within thirty days from the date of public notice of such action as that date is defined in Section 1.4(b) of the Commission's Rules. That section establishes computation of time rules for documents in notice and comment rule making proceedings of general applicability and of particular applicability. Section 1.4(b)(3) states that for rule makings of particular applicability, if the rule making document is to be published in the Federal Register and the Commission so states in its decision, the date of public notice commences on the date of Federal Register publication; if the decision fails to specify Federal Register publication, the date of public notice commences on the release date, even if the document is published in the Federal Register. On the other hand, Section 1.4(b)(1) states that the date of public notice for documents in all other types of notice and comment rule making proceedings is the date of publication of the document in the Federal Register.

4. Martin claims that this proceeding is a rule making of particular applicability within the meaning of Section 1.4(b)(3) of the Commission's Rules, as the *Report and Order* did not allot any new channels which would be made available for application by interested members of the public. He notes that the *Report and Order* did not expressly state that the document was to be published in the Federal Register, and therefore the date of public notice commenced on October 7, 1992, instead of on October 14, 1992, the date of Federal Register publication. He notes that Section 405(a) of the Communications Act of 1934, as amended, specifies that any petition for reconsideration must be filed within thirty days of the date of public notice of that action. Therefore, he claims that since the Commenters' petition for reconsideration was filed on November 13, 1992, more than thirty days after the October 7, 1992, date of public notice, it is untimely and should be dismissed without consideration as to the merits.

5. In response, the Commenters argue that the *Report and Order* is a rule making of general applicability and filing dates are therefore governed by Section 1.4(b)(1) of the Commission's Rules. They argue that courts and the Commission have held that rule makings of particular applicability are those governing matters such as tariffs and

¹ The Commenters are licensees of various radio broadcast stations licensed to Bend, Redmond, Prineville and Warm Springs, Oregon.

² Public notice of the Commenters' petition for reconsideration was given at 57 Fed. Reg. 57066 (December 2, 1992).

Martin filed a petition for reconsideration of the public notice of the Commenters' petition for reconsideration, to which the Commenters filed an opposition. Martin argues that the Commenters' petition for reconsideration was untimely filed, and therefore should not have been placed on public notice. Martin's petition for reconsideration is unacceptable for consideration, as it constitutes an attempt to seek reconsideration of an interlocutory action. See Commission Rule 1.106(a). In any event, we need not address Martin's petition for reconsideration, as we determine in this *Order* that the Commenters' petition for reconsideration was, in fact, timely filed. Therefore, we will dismiss Martin's petition for reconsideration, the Commenters' opposition and Martin's reply.

Martin also filed a petition for declaratory ruling that Section 1.420(f) of the Commission's Rules, which states that the filing of a petition for reconsideration of an order modifying an authorization to specify operation on a different channel shall stay the effect of a change in the rules pending action on the petition, is inapplicable in this case because the petition for reconsideration was untimely filed. The Commenters filed an opposition to the petition for declaratory ruling. It is unnecessary to address the petition for declaratory ruling and the opposition thereto, as the petition is premised on the assumption that the Commenters' petition for reconsideration was untimely filed.

We will resolve the issues raised in the Commenters' petition for reconsideration in a separate *Memorandum Opinion and Order*.

schedules of rates, citing *ABC v. FCC*, 682 F.2d 25 (2d Cir. 1982), and *Declaratory Ruling*, 51 Fed. Reg. 23059 (1986). They also argue that the Commission has consistently held that Federal Register publication of a FM allotment *Report and Order* initiates the reconsideration filing deadline, citing to various Commission staff actions. The Commenters maintain that allotment proceedings are of interest and applicable to the public at large, not merely to the proponent, whether the proposal is for a new allotment or a channel upgrade. They note that even if no competing expression of interest is filed, a party may want to file a counterproposal, comments or a petition for reconsideration. Furthermore, they also argue that an allotment proceeding may have a preclusive effect on all users of broadcast spectrum within a considerable radius of the allotment.³

6. In reply, Martin claims that *ABC v. FCC* "made clear that the term 'rule makings of particular applicability' encompasses far more than merely proceedings to establish a common carrier's rate of return or its schedule of tariffed rates," and that the term applies to the "multitude" of notice and comment rule making proceedings which do not so directly affect preexisting legal rights or obligations as to require Federal Register publication. He notes that in another context, the Commission has stated that proceedings to amend the Table of Allotments do not involve substantial impact on a significant number of entities, citing *Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 84 FCC 2d 791, 792 (1981), and characterizes that proceeding as establishing that channel allotment rule making proceedings are rule makings of particular applicability. Martin argues that the fact that the allotment of a new channel may have a preclusive effect on other users of the spectrum is not sufficient to convert a proceeding to a rule making of general applicability. Finally, he characterizes the various Commission staff cases cited by the Commenters in support of its position as either distinguishable from the instant situation or inapposite to this proceeding.

7. *Discussion.* Martin argues that this broadcast allotment proceeding constitutes a rulemaking of particular, rather than general, applicability, that the timeliness of the petition for reconsideration is therefore covered by 47 CFR 1.4(b)(3) rather than 47 CFR 1.4(b)(1), and that the petition was late-filed under Section 1.4(b)(3). We disagree.

8. Rulemakings of particular applicability under the Administrative Procedure Act and our computation of time rules are those rulemaking proceedings addressed to named persons. In such proceedings, there is no requirement to publish either the proposed or the final rule in the Federal Register, and personal service on the particular parties subject to the rule is sufficient. See 5 USC 552(a)(1)(D); 553(b); *ABC v. FCC*, 682 F.2d 24, 31-32 (2d Cir. 1982); *American Airlines, Inc. v. CAB*, 359 F.2d 624, 630 n.17 (D.C. Cir. 1966); *Practice and Procedure; Clarification of Date of Public Notice*, 51 Fed. Reg. 23059, 23060 (1986); Attorney General's Manual on the Administrative Proce-

dure Act 22, 28 (1947). Thus, Section 1.4(b)(3) was intended to address potential confusion that might arise concerning the date of public notice in such proceedings because, although classified as rulemaking, the Commission in such proceedings may dispense entirely with Federal Register publication. See 47 CFR 1.4(b)(3) ("For rulemakings of particular applicability *if* the rulemaking document is to be published in the Federal Register") (emphasis added).

9. Broadcast allotment proceedings do not fall within this category. They are not rules that apply to named persons. Indeed, it would be impossible to determine in advance all the stations or persons potentially affected by a broadcast allotment proceeding and to serve such parties personally with the proposed or final rule.⁴ Federal Register publication of both the *Notice of Proposed Rule Making* and the *Report and Order* in broadcast allotment proceedings is thus required under Sections 552(a)(1)(D) and 553(b) of the Administrative Procedure Act, and that is our consistent practice. We therefore conclude that, for purposes of the notice and comment and publication requirements of the Administrative Procedure Act and hence for our computation of time rules, broadcast allotment proceedings are rulemakings of general applicability. The petition for reconsideration filed by the Commenters was thus timely filed under 47 CFR 1.4(b)(1).

10. Accordingly, IT IS ORDERED, That the Motion to Strike filed by Schuyler H. Martin IS DENIED.

11. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

³ The Commenters also argue that if the Commission were to change its "consistent stance" and hold that Section 1.4(b)(3), rather than Section 1.4(b)(1), is controlling in this proceeding, the new policy could not be enforced in this case. We will not address this issue, given our resolution herein.

⁴ For example, when the Bureau issued its *Notice of Proposed*

Rule Making in this proceeding, 7 FCC Rcd 501 (1992), in response to a petition for rule making filed by Danjon, Inc., regarding Prineville, Oregon, there is no way it could have anticipated that Martin would file a counterproposal involving Sisters and have served the *Notice of Proposed Rule Making* on Martin.